No. 84-701

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

UNITED STATES OF AMERICA,
Petitioner,
v.
RIVERSIDE BAYVIEW HOMES, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

R. SARAH COMPTON
Counsel of Record
PATRICIA J. BENEKE
KURT J. OLSON
McDERMOTT, WILL & EMERY
1850 K Street, N.W., Suite 50
Washington, D.C. 20006
(202) 887-8000
Attorneys for Amicus Curiae The Chamber of Commerce of the United States

Of Counsel:
ROBIN S. CONRAD
THE NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

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QUESTION PRESENTED

Whether section 404 of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, authorizing regulation of the deposit of dredged or fill material into "navigable waters," also grants jurisdiction for regulation of hydrologically isolated wetlands.

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STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States ("Chamber") is the largest federation of business organizations and individuals in the United States. Current Chamber membership includes more than 180,000 corporations, partnerships and proprietorships, as well as several thousand trade associations and state and local chambers of commerce. The Chamber regularly advocates its members' views in court on issues of national con-

[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 36.2. The parties' letters of consent are on file with the Clerk of this Court.

cern to the American business community. The Chamber's interest in environmental issues is well-established.[2]

This case is important to the business community because it involves the scope of the jurisdiction of the United States Government over certain isolated wetlands under section 404 of the Clean Water Act ("CWA" or "Act").[3] 33 U.S.C. §§ 1251, 1344 (1982). In particular, this case poses the question of whether hydrologically isolated wetlands are appropriately included in the regulatory definition of "waters of the United States" [4] for purposes of the dredged and fill permitting program which is administered jointly by the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps"). Under the Corps' present definition of "waters of the United States," the 80 acres of partially developed suburban land at issue here would be within the Corps' jurisdiction and subject to a prohibition against all development, merely because the land itself is sometimes wet.

The Chamber views the Government's assertion of jurisdiction over such hydrologically isolated wetlands as a classic example of federal regulatory overreaching. The

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[2] *See, e.g., Dow Chemical Co. v. United States*, 749 F.2d 307 (6th Cir. 1984), *cert. granted*, 53 U.S.L.W. 3863 (U.S. June 10, 1985) (No. 84-1259); *Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.*, 53 U.S.L.W. 4193 (U.S. February 27, 1985); *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 595 F. Supp. 65 (D.D.C. 1984), *appeal docketed*, Nos. 84-5566-69 (D.C. Cir. 1984).

[3] The Federal Water Pollution Control Act was originally enacted by the Act of June 30, 1948, ch. 758, 62 Stat. 1155. The Act has been subsequently amended and was substantially revised in 1972. Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, 86 Stat. 816. In 1977, the Act again was substantially revised and renamed the Clean Water Act. 33 U.S.C. § 1251 note. The statute is referred to by its new name throughout the brief.

[4] The definition of "waters of the United States" is set forth at 33 C.F.R. § 323.2(a) (1984).

CWA is not, and was not designed to be, a wetlands preservation statute. Yet, by asserting regulatory jurisdiction over such wetlands, the Government has attempted to convert this Act into the equivalent of a national wetlands law, even though productive economic use of such lands would pose no threat to the quality of the nation's waters.

Many Chamber members have had development plans ruined by the Corps' assertion of CWA jurisdiction over their property. Other members have been denied the potential economic benefits that result from development. As the principal voice of the American business community, the Chamber is well-suited to present the broad interests of business in this case.

STATEMENT

The issue presented in this case is whether hydrologically isolated wetlands [5] are appropriately included within the scope of the regulatory definition of "waters of the United States" [6] for purposes of the dredged and fill permitting program of the CWA.

Section 404 of the CWA provides for issuance of permits for the discharge of dredged or fill material into the "navigable waters," defined by section 502(7), 33 U.S.C. § 1362(7), as "waters of the United States, including the territorial seas." The term "waters of the

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[5] For purposes of the CWA, "wetlands" are defined by the Corps as:

> those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

33 C.F.R. § 323.2(c) (1984).

[6] *See* footnote 4, *supra* at 2.

United States" is not defined in the Act, but has instead been defined by the Corps' regulations. *See* 33 C.F.R. § 323.2(a).

As demonstrated in this case, the Corps has interpreted section 404 and this implementing regulation as a license to engage in the broad-ranging regulation of hydrologically isolated wetlands which have no relationship whatsoever to the purpose of the CWA—"to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

In fact, as demonstrated below, the basic rationale for extending the concept of "waters of the United States" to any wetlands at all was to insure that pollution is stopped at its source, before it could reach those water bodies traditionally viewed as navigable.[7] This rationale is wholly lacking in the context of hydrologically isolated wetlands. Consequently, the Chamber asserts that Congress never intended to exert CWA jurisdiction over such isolated wetlands.[8]

In analyzing the question before this Court, it is important to note the several matters *not* at issue here: the ecological value of wetlands; the importance of protecting wetlands; and the constitutional authority of

[7] *See, e.g., United States v. Byrd*, 609 F.2d 1204, 1210 (7th Cir. 1979) (pertaining to wetlands adjacent to a lake and stating, "Destruction of all or most of the wetlands around [the lake] . . . could significantly impair the attraction the lake holds for interstate travelers by degrading the water quality of the lake. . . .").

[8] Indeed, no court has ever held that Congress so intended. *See, e.g., Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983) (pertaining to backwater swamp annually flooded by rivers); *United States v. Tilton*, 705 F.2d 429 (11th Cir. 1983) (pertaining to wetlands hydrologically linked to river 30 feet away); *United States v. Byrd*, 609 F.2d 1204 (7th Cir. 1979) (pertaining to wetlands adjacent to lake, the destruction of which could degrade the water quality of the lake); *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978) (pertaining to salt ponds periodically submerged by waters from San Francisco Bay).

Congress to enact wetlands preservation legislation if it so chooses. What is at issue in this case is whether Congress intended, in passing the CWA, to extend the Government's authority to hydrologically isolated wetlands, thereby effectively prohibiting development in many cases. We think not.

The wetlands at issue in this case are distinguishable from many acres of other wetlands which do, arguably, play some role in preserving the quality of the nation's waters. Here, there is no hydrological connection by which pollution might move between the water of the wetland itself and other surface water bodies. Although surface waters do exist in the vicinity,[9] the District Court found that:

> the contiguous navigable waters have not contributed to the wetland type of vegetation on defendants' property.

Pet. App. 25a.

Most significantly, the district court expressly adopted expert testimony that "the nearness of the lake and canals had *no hydrological effect* on the soil beyond a 50 to 100-foot distance (emphasis added)." *Id. See also* Pet. App. 34a. This hydrological isolation stems from the type of soil comprising the land in question, *i.e.*, Lamson soil, which is impermeable, does not drain well, and is characterized by high water table and water near the surface. Pet. App. 25a; Jt. App. 108.[10]

Despite the Government's assertion of CWA jurisdiction over this tract, neither the CWA nor its legislative history reflects any intent on the part of Congress to

[9] Lake St. Clair is one mile east of the land, the Clinton River is to the north and Black Creek is to the east. Petitioner's Appendix ("Pet. App.") 2a, 6a.

[10] In addition to impermeable soil, measures taken in 1973 to protect homes and businesses from the flood waters of Lake St. Clair impaired drainage on the land. Pet. App. 3a.

exert jurisdiction over such hydrologically isolated wetlands. Instead, they indicate that Congress intended the term "waters of the United States" to include only those water bodies traditionally considered to be the conduits of interstate and foreign commerce and other waters which are hydrologically connected thereto—not hydrologically isolated wetlands such as those involved herein. *See A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong. 1st Sess. (1973) (Volumes 1 and 2); *A Legislative History of the Clean Water Act*, 95th Cong., 2d Sess. (1978) (Volumes 3 and 4) (hereinafter cited as "Legis. Hist.") 1 Legis. Hist. at 178, 250-251.

SUMMARY OF ARGUMENT

1. The CWA and the legislative history of the 1972 Amendments and the 1977 Amendments to the Act fail to establish that Congress intended to extend federal jurisdiction under the CWA to hydrologically isolated wetlands. By the terms of the CWA itself (*see, e.g.*, 33 U.S.C. § 1251(a)), and as reflected in the legislative history of the 1972 Amendments and 1977 Amendments, Congress' goal in enacting the CWA was the protection of water quality. The exercise of federal jurisdiction over hydrologically isolated wetlands, such as those at issue herein, is wholly unrelated to the goals of the CWA and goes far beyond the limits of jurisdiction granted by section 404 of that Act. 33 U.S.C. § 1344.

2. The CWA is neither a wetlands preservation act nor a land use planning act. The legislative history of the 1972 and 1977 Amendments fails to demonstrate that Congress intended the CWA to be a wetlands protection statute. Further, there is no indication that Congress intended the CWA to be used as a land use planning mechanism to regulate local development. Indeed, land use planning is a matter traditionally left to states and local authorities, and many states have adopted their own measures to protect wetlands.

ARGUMENT

I. CONGRESS HAS NEVER MANIFESTED ANY INTENT TO EXTEND FEDERAL JURISDICTION UNDER THE CLEAN WATER ACT TO HYDROLOGICALLY ISOLATED WETLANDS.

A. The Goals of the CWA are Attainable Without Any Federal Jurisdiction Over Such Isolated Wetlands.

The CWA is a water quality statute. Its simply-stated objective is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this objective, Congress adopted a regulatory scheme designed to limit, and then eliminate, pollutants discharged into navigable waters. 33 U.S.C. §§ 1311(a), 1342, 1344.

Recognizing that water moves in "hydrological cycles," [11] Congress enunciated that its intent was to control pollution at its source. Consequently, Congress adopted an "end of pipe" technology approach for liquid effluents,[12] a point source discharge approach for dredged or fill materials,[13] and extended the geographical jurisdiction of the Act to the limits necessary to achieve its goals.

Congress realized that to preserve the quality of waters traditionally considered to be navigable, it was necessary to extend the scope of the Act to control and regulate water hydrologically connected thereto. The unrestricted discharge of potential pollutants into hydrologically connected waters could affect the quality of those waters and consequently, the quality of the water bodies forming the traditional conduits of commerce.

Congress also recognized, however, that federal jurisdiction over the waters and activities therein was not

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[11] 2 Legis. Hist. at 1495.

[12] *See, e.g.*, sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311, 1342.

[13] *See, e.g.*, section 404 of the CWA, 33 U.S.C. § 1344.

unlimited. Accordingly, Congress tailored its intentions to meet its express goals. Indeed, as set forth in detail below, the statements of the conferees clearly demonstrate that, in their view, the jurisdictional reach of the federal government was confined to those water bodies forming a conduit for commerce and other waters hydrologically connected to such water bodies.[14] This perceived limitation on the jurisdiction of the federal government, whether or not a correct interpretation of the actual extent of the power of Congress to regulate the nation's waters under the Commerce Clause, art. I, § 8, cl. 3, forms the limiting principle of the federal government's jurisdiction under the CWA.

Although Congress undoubtedly could, if it so chooses, regulate certain dredged or fill activities in isolated or unconnected wetlands under its Commerce Clause power, Congress did not intend to do so in enacting the CWA. Congress specifically sought to maintain the quality of those water bodies forming a conduit of commerce and recognized the need to regulate the use of other hydrologically connected waters, the degradation or destruction of which could have an effect on those conduits of commerce. The Commerce Clause power was exercised specifically to accomplish these objectives. In this sense the term "'navigable waters' [is] given the broadest possible constitutional interpretation" as intended by Congress, (*see* 1 Legis. Hist. at 818), even though it does not include hydrologically isolated wetlands. Accordingly, the CWA should not be interpreted as a blanket grant to regulate all waters of whatever nature and wherever

[14] The geographic scope of federal jurisdiction over water bodies is defined in terms of conduits of waterborne commerce. Federal regulatory authority within these geographical confines, however, is not limited to navigability alone, and the abatement of pollution is well within the power of the federal government to exercise control over its waters. *United States v. Standard Oil Co.*, 384 U.S. 224 (1966).

found, regardless of their potential to affect the quality of the nation's "navigable waters."

B. The 1972 Amendments Neither Expressly Nor Implicitly Adopted any Regulatory Device for Wetlands, Much Less For Those Wetlands Which Are Hydrologically Isolated.

When it enacted the 1972 Amendments, Congress did not enunciate any policy or enact any provision regarding wetlands preservation or regulation. Indeed, nowhere in the 1972 Amendments or their legislative history are wetlands even mentioned.

The 1972 Amendments did, however, adopt section 404, a provision designed primarily to consolidate in the Corps permitting authority for the discharge of dredged or fill material into navigable waters.[15] Like the rest of the 1972 Amendments, section 404 did not reference wetlands.

In the 1972 Amendments, Congress authorized the Corps to issue permits for the discharge of dredged or fill material into navigable waters. Section 404 "navigable waters" were defined as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). While this definition is less than explicit, the legislative history of the 1972 Amendments succinctly establishes Congress' intent to regulate only those bodies of water

[15] Under the Senate version of the 1972 Amendments, the discharge of dredged or fill material was treated like the disposal of any other pollutant requiring a permit issued by EPA pursuant to proposed section 402. S.2770, 92d Cong., 1st Sess. § 402 (1971). The House, recognizing that permits for dredging activities in navigable waters were then required under the Rivers and Harbors Act of 1899, and were issued by the Corps, designated the Corps rather than EPA as the appropriate permit issuing authority in its version of the 1972 Amendments. H.R. 11896, 92d Cong., 2d Sess. § 404 (1972). The agreement reached at conference adopted the House bill insofar as it related to the Corps' permitting and regulating authority. 1 Legis. Hist. at 177.

having potential for involvement as conduits of commerce and waters hydrologically connected thereto. As shown below, isolated wetlands unconnected in a hydrological sense, were not contemplated by Congress.

In the Senate version of the 1972 Amendments, "navigable waters" were defined as:

> [t]he navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes.

S. 2770, 92d Cong., 1st Sess. § 502(h) (1971). In explaining the purposes of this definition, the Senate Committee on Public Works stated that:

> [t]he control strategy of the Act extends to navigable waters. The definition of this term means the navigable waters of the United States, portions thereof, tributaries thereof, and includes the territorial seas and the Great Lakes. Through a narrow interpretation of the definition of interstate waters the implementation of [prior laws was] severely limited. *Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries.*

2 Legis. Hist. at 1495 (emphasis added).

The Senate definition encompasses only those water bodies traditionally considered to be the conduits of interstate and foreign commerce and other water bodies which are hydrologically connected thereto. Given the fact that "[w]ater moves in hydrologic cycles," (*id.*), the Senate recognized that little would be accomplished by controlling pollution only in navigable waters if unrestricted discharges were permitted in connected water sources. However, the Senate clearly was not addressing lands that are sometimes wet that would not, because of their isolation, be the source of pollutants in "navigable waters."

The House version of the 1972 Amendments originally defined navigable waters as:

> [t]he navigable waters of the United States, including the territorial seas.

H.R. 11896, 92d Cong., 2d Sess. § 502(8) (1972). The House Committee on Public Works stated in its report that:

> [o]ne term that the Committee was reluctant to define was the term "navigable waters". The reluctance was based on a fear that any interpretation would be read narrowly. However, this is not the Committee's intent. The Committee fully intends that the term "navigable waters" be given the broadest possible constitutional interpretation. . . .

1 Legis. Hist. at 818. Thus, the House definition was intended to be co-extensive with the federal government's constitutionally permissible jurisdiction over navigable waters.[16] Viewed in this light, and with reference to the case law existing at the time,[17] the House definition of navigable waters was essentially the same as that of the Senate, and included waters traditionally considered to be

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[16] In defining the term "navigable waters" Congress was aware of and concerned with prior administrative interpretations of this term which severely limited the geographic reach of the federal government. 1 Legis. Hist. at 327, 818. To avoid similar limitations from being imposed in the case of the CWA, Congress sought to make very clear, that "navigable waters" was to encompass not only the traditional conduits of commerce, but also, all waters hydrologically connected thereto.

[17] The case law at the time of the 1972 Amendments, defined navigable waters of the United States subject to regulation under the Commerce Clause as those which were navigable in fact, made so with reasonable improvement, non-navigable portions of otherwise navigable waters and tributaries of navigable waters. *The Daniel Ball*, 77 U.S. 999 (10 Wall. 557) (1870); *The Montello*, 87 U.S. 391 (20 Wall. 430) (1874); *Economy Light and Power Co. v. United States*, 256 U.S. 113 (1920); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940); *Oklahoma ex rel. Phillips v. Guy F. Atchinson Co.*, 313 U.S. 508 (1940).

conduits of commerce and other waters hydrologically connected thereto. The intent of this definition was expressly confirmed by the Conference Committee.

The Conference Committee defined "navigable waters" as:

> [t]he waters of the United States, including the territorial seas.

1 Legis. Hist. at 327. While the Committee struck the word "navigable" from the definition proposed by the House, the Committee's explanation of its actions demonstrates that the substantive effect of the definition was intended to be no broader than the jurisdictional scope established in the House and Senate versions of the definition.

In the Senate Report on the Conference, the Senate conferees stated that:

> One matter of importance throughout the legislation is the meaning of the term "navigable waters of the United States."
>
> The conference agreement does not define the term. The Conferees fully intend that the term "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.
>
> Based on the history of consideration of this legislation, it is obvious that its provisions and the extent of application should be construed broadly. *It is intended that the term "navigable waters" include all water bodies, such as lakes, streams and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other streams of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other states or with foreign countries in the customary means of trade and travel in which commerce is conducted today.*

1 Legis. Hist. at 178 (emphasis added).

The same intent of regulating only those water bodies forming a conduit for commerce and waters hydrologically connected thereto was expressed by the House Conferees who recognized a distinction between the new concept of conduit of commerce and the old technical navigable in fact test:

> [T]he conference bill describes the term "navigable waters" broadly for water quality purposes. It means all "the waters of the United States" in a geographic sense. It does not mean "navigable waters of the United States" in a technical sense as we sometimes see in some laws.
>
> The new and broader definition is in line with more recent judicial opinions which have substantially expanded the limited view of navigability—derived from the Daniel Ball case . . . —to include waterways which would be "susceptible of being used . . . with reasonable improvement," as well as . . . waterways which include sections presently obstructed by falls, rapids, and sand bars, currents, floating debris, et cetera . . . .
>
> The U.S. Constitution contains no mention of navigable waters. The authority of Congress over navigable waters is based on the Constitution's grant to Congress of "Power . . . to regulate commerce with Foreign Nations and among the several States" . . . Although most interstate commerce 150 years ago was accomplished on waterways, there is no requirement in the Constitution that the waterway must cross a State boundary in order to be within the interstate commerce power of the Federal Government. Rather, it is enough that the waterway serves as a link in the chain of commerce among the States

> as it *flows in the various channels of transportation*—highways, railroads, air traffic, radio and postal communication, waterways, et cetera. The "gist of the Federal test" is the waterway's *use "as a highway,"* not whether it is "part of a navigable interstate or international commercial highway."

1 Legis. Hist. 250-251 (Statement of Rep. Dingell) (emphasis added).

Moreover, the Conferees emphasized the purpose for which the statute was to be enacted:

> Thus, the new definition clearly encompasses all water bodies, including main streams and their tributaries, *for water quality purposes.*

Id.

The legislative history of the 1972 Amendments demonstrates that while not explicitly defining the term "navigable waters," Congress intended it to encompass all waters forming a conduit for interstate and foreign commerce and all waters which are hydrologically connected thereto, the use, destruction or degradation of which would affect the quality of these main water bodies. Isolated wetlands were not viewed by Congress as "navigable waters" and were not intended to be covered by the Act.

C. The Legislative History of the 1977 Amendments Reflects No Congressional Intent to Include Hydrologically Isolated Wetlands in the Definition of "Navigable Waters."

No action taken subsequent to 1972 alters the conclusion that hydrologically isolated wetlands do not fall within the meaning of the term "navigable waters" for purposes of the CWA. As in 1972, the legislative history to the 1977 amendments fails to lend any support to the proposition that hydrologically isolated wetlands fall within the purview of the Government's regulatory au-

thority.[18] Significantly, the 1977 amendments did nothing to change the statutory definition of "navigable waters."[19] Thus, it is the history of the 1972 amendments rather than the history of the amendments of 1977, that is instructive on the issue of legislative intent with respect to the meaning of "navigable waters" and the reach of the Corps' jurisdiction.[20]

The legislative history to the 1977 amendments reconfirms that Congress' objective in enacting the statute was the protection of water quality.[21] Congress evidenced its concern for water quality when it added, in 1977, two provisions in section 404 only after making, or requiring

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[18] Note that the Corps has equivocated on its own thoughts and position concerning the definition of "navigable waters." On May 12, 1983, the Corps published proposed regulations providing that in order for wetlands to be "adjacent" to waters of the United States and therefore "navigable waters" under the CWA, they must not only be "bordering, contiguous, or immediately neighboring," but must also have "a reasonably perceptible surface or sub-surface hydrologic connection to a water of the United States." 48 Fed. Reg. 21466, 21474 (1983). The currently applicable regulations, promulgated in 1977, contain a much broader definition of navigable waters. *See* 33 C.F.R. § 323.2(a).

[19] The 1977 legislative history does reflect a concern over the excessive exercise of jurisdiction by the Corps. In the House of Representatives, H.R. 3199 passed overwhelmingly, limiting the extent of the Corps' jurisdiction. After narrowly defeating a comparable provision offered by Senator Bentsen, the Senate declined to redefine "navigable waters," in its bill, S.1952, which was essentially the version adopted by the Conference Committee.

[20] Congressional inactivity in 1977 with respect to the definition of "navigable waters" ought not to be construed as an expression of congressional intent. *Federal Trade Commission v. Dean Foods Co.*, 384 U.S. 597 (1966); *Helvering v. Hallock*, 309 U.S. 106 (1940).

[21] *See, e.g.*, Statement of Senator Muskie inserting testimony of Russel Train declaring that the "overriding purpose" of the CWA is "to restore and maintain the ecological health of our nation's waters." 4 Legis. Hist. at 851.

the Corps to make, a threshold determination regarding the effect on water quality. 33 U.S.C. § 1344(e), (f).

One such provision, subsection 404(e), authorized the Corps to issue general permits for categories of activities involving discharges of dredged or fill material, only when such activities have been determined to have "minimal cumulative adverse effects" on water quality. Similarly, Congress added subsection 404(f), which exempted from the operation of section 404 certain activities, including normal farming, silviculture, and ranching activities, that Congress deemed not to have a serious adverse impact on water quality. As expressed in the Conference Report to the 1977 amendments:

> These specified activities should have no serious adverse impact on water quality if performed in a manner which will not impair the flow and circulation patterns and the chemical and biological characteristics of the affected waterbody and which will not reduce the reach of the affected waterbody.

3 Legis. Hist. at 283.

Congress' focus, then, continued to be the protection of water quality. Recognizing that certain activities would not have adverse effects on water quality, Congress proceeded to exempt them, or authorize their exemption, from the requirements of section 404. Indeed, if wetlands protection *per se* rather than water quality were at the heart of the CWA, it is unlikely that Congress would have adopted these exemptions.[22]

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[22] It is of note that Congress has seen fit to introduce several proposals with the express purpose of preserving wetlands. Indeed, several wetlands protection bills have been introduced in the current session of Congress. Prominent among the legislation introduced this session is H.R. 1203, 99th Cong., 1st Sess. (1985), the Emergency Wetland Resources Act of 1985. Similarly, the Senate has introduced S. 740, 99th Cong., 1st Sess. (1985), the Emergency Wetlands Resources Act of 1985, which provides for a range of activities aimed at protecting wetlands.

[Continued]

II. THE CWA IS NEITHER A WETLANDS PRESERVATION ACT NOR A LAND USE PLANNING ACT.

Notwithstanding the overriding water quality objective of the CWA, section 404 has been expanded such that it now encompasses wetlands preservation and land use management. As discussed above, this expansion is entirely inconsistent with Congress' intent.[23] Moreover by this expansion, the Government is entering a realm of broader land use issues that are appropriately regulated by the states through local legislation.

Prior to engaging in any activity which involves the discharge of dredged or fill material into navigable waters, a person must obtain a permit from the Corps. 33 U.S.C. §§ 1311, 1344. Absent such a permit, the activity is in violation of the CWA, and the person en-

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[22] [Continued]

Other wetlands protection legislation introduced this session includes: H.R. 572, 99th Cong., 1st Sess. (1985), the National Wetlands Inventory and Evaluation Act (a bill to authorize the Secretary of the Interior to classify and inventory wetlands resources, to measure wetlands degradation, to evaluate the environmental contribution of natural wetlands, and for other purposes); H.R. 1000, 99th Cong., 1st Sess. (1985), S.626, 99th Cong., 1st Sess. (1985), the Farm Debt Restructure and Conservation Set Aside Act of 1985 (a bill to authorize the Secretary of Agriculture to acquire easements for conservation, recreational and wildlife purposes in wetlands, uplands and highly erodible land); and S. 1035, 99th Cong., 1st Sess. (1985), the Fragile Lands Conservation and Wetlands Protection Act of 1985 (a bill to promote the conservation of highly erodible land and wetlands, and for other purposes).

[23] In addition to not being authorized under the CWA, the Corps' 404 program has exacted substantial costs from the regulated community. These costs are borne not only by permit applicants but also by people who would otherwise benefit from the activities requiring a permit. As stated by the Office of Technology Assessment, "Projects that are abandoned, made less profitable or never initiated mean potential losses in job opportunities, economic developments and tax revenue." Office of Technology Assessment, Congress of the United States, OTA-0-206, *Wetlands Their Use and Regulation* (1984) at 153.

gaging in the activity is subject to civil penalties and criminal sanctions. 33 U.S.C. §§ 1311, 1339. Accordingly, the Corps often is the final arbiter of whether an activity is or is not conducted. In the case of isolated wetlands, this role assumed by the Corps places it in the position of determining the propriety of local land development. *See, e.g.*, 40 C.F.R. Part 230 (1984) (Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material, requiring an assessment of practicable alternatives).

The regulation and control of land use, however, is traditionally a function performed by local governments which, unless usurped deliberately by Congress, remains with the states. *See Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979). This traditional state role was expressly recognized by Congress in the CWA. 33 U.S.C. § 1251(b). In the declaration of goals and policy of the 1972 Amendments, Congress stated that it was its policy to:

> [R]*ecognize, preserve and protect the primary responsibilities and rights of states* to prevent, reduce, and eliminate pollution, *to plan the development and use (including restoration, preservation and enhancement) of land and water resources.*

Id. The role of the states also was recognized by Congress when considering the 1977 Amendments. As expressed by Congressman Roberts in debating the conference report to the 1977 CWA amendments:

> More importantly, the Federal Government cannot and should not be expected to assume the entire responsibility for environmental protection. The States and local governments have a significant role to play. Yet an expanded Federal program would discourage the States from exercising their responsibilities to protect water and wetland areas.

3 Legis. Hist. at 348 (Statement of Mr. Roberts). *See also* 3 Legis. Hist. at 419 (Statement of Mr. Harshaw)

("The conference amendment recognizes that the States should be responsible for controlling the discharge of dredged or fill material in State waters that do not involve interstate or foreign commerce.").

Being essentially a land use control function, the protection of hydrologically isolated wetlands is thus appropriately exercised by the states. Indeed, numerous states—nearly half—have enacted wetlands protection legislation.[24]

All of the coastal states have adopted some legislation to protect coastal resources. 2 F. GRAD, ENVIRONMENTAL LAW § 10.04 (1984). Nearly all of this legislation provides, in essence, that its purpose is to protect, preserve and enhance wetlands and other coastal areas, while pro-

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[24] *See, e.g.*, ALA. CODE §§ 9-7-10 to 22 (1980, Supp. 1984); ALASKA STAT. §§ 46.40.010 to .210 (1982, Supp. 1984); CAL. PUB. RES. CODE §§ 5001.5-65 (Supp. 1984); CONN. GEN. STAT. chap. 440, §§ 22a-28, 22a-90 to 122 (1975, Supp. 1983); DEL. CODE ANN. tit. 7, §§ 7001-7013 (Supp. 1983); GA. CODE §§ 12-5-210 to 312 (1982); HAWAII REV. STAT. §§ 205A-1 to 22 (1976, Supp. 1982); LA. REV. STAT. ANN. tit. 49, ch. 213, §§ 213.1 to 22 (West 1985); ME. REV. STAT. ANN. tit. 38, §§ 471-478, tit. 12, §§ 4751-4758 (1978, Supp. 1984); MD. NAT. RES. CODE ANN. §§ 9-101 to 501 (1974); MASS. ANN. LAWS ch. 131, §§ 40, 40(a), ch. 252, §§ 1-24 (Michie/Law. Co-op. 1980, Supp. 1985); MICH. STAT. ANN. §§ 18-595(51) to (72) (Callaghan Supp. 1985); MINN. STAT. §§ 105.37 to .403 (1977, Supp. 1985); MISS. CODE ANN. §§ 49-27-1 to 69 (Supp. 1984); MONT. CODE ANN. §§ 75-7-101 to 308 (1983, 1984); N.H. REV. STAT. ANN. §§ 483-A:1-7 (1983); N.J. STAT. ANN. §§ 13:9A-1A to 9A-6, 17-1 to 17-86, 18A-1 to 18A-29 (West 1979, Supp. 1984); N.Y. ENVT. CONSERV. LAW §§ 24-0101 to 1305, §§ 25-0101 to 0404, §§ 34-0101 to 0113 (McKinney 1981); N.C. GEN. STAT. §§ 113A-100 to 128 (1983); N.D. CENT. CODE §§ 29-06.31-01 to 10 (Supp. 1983); PA. STAT. ANN. §§ 11941, 11945 (Purdon Supp. 1985); R.I. GEN. LAWS §§ 2-1-13 to 27, §§ 46-23-1 to 18 (1980 Supp. 1983); S.C. CODE ANN. tit. 48, ch. 39, §§ 48-39-10 to 220 (Supp. 1984); TEX. NAT. RES. CODE, §§ 33.001 to .238, §§ 155.1 to .9 (Vernon 1982, Supp. 1984); VA. CODE tit. 62, §§ 62.1-13.1 to 13.8 (1982, Supp. 1985); WASH. REV. CODE ANN. §§ 90.58.020 to .140 (Supp. 1985); W. VA. CODE art. 5B §§ 20-5B-1 to 14 (1981).

viding for sound resource development and management, and for the protection of certain private rights. *Id. See, e.g.*, MD. NAT. RES. CODE ANN. § 9-102 (1974) (stating a purpose of preserving and protecting wetlands functions while preserving riparian rights); MISS. CODE ANN. § 49-27-3 (Supp. 1984) (providing for preservation of natural state of coastal wetlands and prevention of their despoilation except under limited circumstances); N.Y. ENVT. CONSERV. LAW § 25-0102 (McKinney 1981) (providing for preservation and protection of tidal wetlands); VA. CODE § 62.1-13.1 (1982, Supp. 1985) (providing for preservation of wetlands and prevention of their despoilation and destruction together with accommodation of necessary economic development in manner consistent with wetlands preservation).[25]

Consequently, in view of the fact that the legislative history establishes that the CWA was not intended to be either a wetlands preservation act or a land use planning act, the Government's attempt, through the exercise of jurisdiction under section 404, to preserve and regulate the use of hydrologically isolated wetlands should be rejected.

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[25] Examples of other states with wetlands protection statutes include Connecticut, whose statute provides for the protection of tidal wetlands through the requirement of permits to engage in regulated activities on such tidal wetlands. CONN. GEN. STAT. §§ 22a-28 to 32 (Supp. 1983). The State of Maryland's statutory scheme addresses the protection of wetlands and riparian rights, providing that, *inter alia*, the Secretary of Natural Resources promulgate rules and regulations "governing dredging, filling, removing, or otherwise altering or polluting private wetlands." MD. NAT. RES. CODE ANN. § 9-302 (1974). The Rhode Island statute declares that "[i]t is the public policy of this state to preserve the purity and integrity of the coastal wetlands of this state," and authorizes establishment of a program to regulate the disturbance or use of wetland areas. R.I. GEN. LAWS §§ 2-1-13 to 15 (1980, Supp. 1983).

CONCLUSION

For these reasons and those stated in the Brief of Respondents Riverside Bayview Homes, Inc., the Chamber respectfully urges the Court to rule that hydrologically isolated wetlands do not fall within the jurisdiction granted by section 404 of the CWA.

Respectfully submitted,

R. SARAH COMPTON
Counsel of Record
PATRICIA J. BENEKE
KURT J. OLSON
MCDERMOTT, WILL & EMERY
1850 K Street, N.W., Suite 500
Washington, D.C. 20006
(202) 887-8000
Attorneys for Amicus Curiae
The Chamber of Commerce
of the United States

Of Counsel:
ROBIN S. CONRAD
THE NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

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